No. 20,429

IN THE

United States Court of Appeals

For the Ninth Circuit

HUDSON WATERWAYS CORPORATION,
a corporation,
Appellant,

vs.

WILLIAM J. SCHNEIDER,
Appellee.

Appeal from an Admiralty Decree of the United States District Court for the Northern District of California, Southern Division
Honorable Albert C. Wollenberg, District Judge

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

A.

JURISDICTION

This Court has jurisdiction of this cause on the basis of the facts and authorities cited in Appellant's Opening Brief.

B.

STATEMENT OF THE CASE

I. Introduction.

William J. Schneider, a marine engineer, suffered permanent injury to his nervous system when he

received a severe electric shock from latently defective equipment in the course of his work aboard appellant's ship. A final decree in admiralty in favor of Mr. Schneider for $40,427.00 was entered upon findings of unseaworthiness of appellant's vessel and negligence of the corporate shipowner. The nature and extent of appellee's injuries and the amount of the award is not challenged here.

The appellant shipowner seeks reversal of the decree contending that (1) the vessel's warranty of seaworthiness did not extend to the appellee crew member as a matter of law; (2) there was no evidence of negligence on the part of the shipowner; and, (3) the Court erred in finding appellee free of contributory negligence.

The following statement of facts from the record and appellee's argument will demonstrate that the findings and decree in favor of appellee are based upon substantial evidence and are entirely consistent with applicable principles of maritime law.

II. Statement of the Facts Relating to the Issues of Unseaworthiness, Negligence and Contributory Negligence.

Appellee, William J. Schneider, is a licensed marine engineer, 49 years of age and resides at Studio City, California. (Tr. 2, 5.) He was injured about 12:30 in the afternoon on January 27, 1964 in the course of his employment on board appellant's ship the SS. TRANSORLEANS, a T-2 Tanker. (Tr. 11-12, 14.) Mr. Schneider joined the ship at Stockton, California on January 15, 1964 and signed the Shipping Articles

at San Francisco the following day. (Appellant's Exhibit J, pp. 10-11.)[1] Appellee had never served on this vessel before. (Exh. J, p. 11.) At the time he was hurt, the ship was in navigable waters en route from San Francisco to Panama. (Tr. 11; Exh. J, p. 11.)

About noon on the date of the accident, appellee was directly ordered by the First Assistant Engineer to check the ship's service A.C. [alternating current] standby air compressor which had stopped running and to get it running again. (Tr. 12-13; Exh. J, pp. 11-12.) In obedience to these orders of his superior officer, Mr. Schneider first checked the main breaker switch on the master panel located on the operating platform (Tr. 102-103); he then proceeded to the place where the air compressor was situated near the middle of the control platform, one deck below the operating platform in the engine room. (Tr. 14.) The temperature in the engine room was about 105 to 110 degrees Fahrenheit; it was somewhat higher in the vicinity of the air compressor, and appellee was perspiring. (Tr. 14-15.) The platform on which appellee was standing was solid sheet metal. (Exh. J, p. 22.) He then noticed that the compressor was not operating and that its knife switch had been pulled into the "off" position. (Tr. 15; Exh. J, p. 18.) He then closed the knife switch but the unit did not start up. (Tr. 15; Exh. J, pp. 15-16.) Mr. Schneider next

[1]Appellant's Exhibit J (hereinafter referred to as Exh. J) is the deposition of the appellee, W. J. Schneider, in evidence (Tr. 277-8, 281). This exhibit is not mentioned in Appellant's Opening Brief or in Appellant's Appendix thereto but it is part of this record on appeal.

reached for the manual control metal switch box in order to start the unit by tripping the manual trigger switch on the outside of this box. (Tr. 15; Exh. J, pp. 16-20.) As he reached for this switch, he noticed that the manual control box was unbolted and not properly secured to the air compressor. (Tr. 15-16; Exh. J, pp. 20-21.) When he touched the box with his left hand to steady it, he received a severe electrical shock (either 440 or 220 volts of alternating current) which knocked him back two or three feet. (Tr. 16-17.)

Appellee immediately reported the accident to his superior officers. (Tr. 17-18.) After resting topside for a few minutes, he disconnected the power to the unit by opening the knife switch, and then removed the cover of the control box from which he had received the electric shock. (Tr. 18-19.) The electric wires leading into the box which could be seen from the outside were insulated (Exh. J, pp. 24-25), but upon opening the box, the inside was found to be soaking wet and contained about a foot and a half of excess, old, corroded, bare wires, the exposed portions of which were touching the inside of the box. (Tr. 19; Exh. J, pp. 24-25.) Upon discovering these existing hazards inside the switch box, appellee corrected the defective conditions by drying out the interior of the box and removing the excess portions of the bare wires which were making contact with the metal inside. (Tr. 19.) He then hooked up the remaining wires properly and closed the box. He then put on the power to the compressor by closing

the knife switch and the unit started right up. (Tr. 19-20.)

Appellee acted in accordance with ordinary prudence under the circumstances as evidenced by the testimony of his expert witness, Charles A. Black, a Chief Engineer with thirty years experience at sea. (Tr. 282.) Mr. Black sailed as Chief Engineer on numerous T-2 tankers and was familiar with the type of air compressor unit here involved. (Tr. 283-284.) Mr. Black testified that when such unit was not working and an engineer was ordered to go down and get it running, it was usual, ordinary and customary practice to first check the main breaker switch to see that the power is on, next to engage the knife switch and if the unit does not go, then to engage the hand button and then trip the hand control switch. (Tr. 284-286.) It is also of record that it was not appellee's duty to check inside electric wiring on machinery prior to the accident; this was the duty of the ship's First Engineer. (Exh. J, p. 25.)

As a result of the electric shock from the defective switchbox appellee suffered serious organic and psychic damage to his nervous system for which the District Judge assessed an award of $40,427.00. (District Court's Findings Nos. 11 through 23; R. 71, et seq.)[2]

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[2]Neither the nature and extent of appellee's resultant disability or the amount of the award is challenged on appeal by the shipowner.

C.

SUMMARY OF THE ARGUMENT

Every crew member injured in the service of a live merchant ship is protected under the umbrella of the seaworthiness doctrine. The injured seaman does not assume the risk of latent dangerous conditions encountered in the course of his employment aboard his ship. The shipowner has an absolute, continuing and non-delegable duty to provide and maintain seaworthy equipment and safe working conditions on board its vessel. This duty cannot be shifted or delegated to the injured seaman under the guise of contributory negligence, or under the so-called "primary duty" rule. Determinations of unseaworthiness and negligence are normally questions of fact and should be sustained on appeal where the determination of the trial judge is not clearly erroneous. In addition, appellee was here entitled to the benefit of the doctrine of res ipsa loquitur. The record clearly sustains the trial court's finding of liability in this case.

D.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THE VESSEL'S WARRANTY OF SEAWORTHINESS EXTENDED TO LIBELANT.

The appellant shipowner does not contend that the District Court erred in finding that a latently defective switchbox rendered its vessel unseaworthy. Appellant asserts that the doctrine of unseaworthiness did not extend to the appellee because he was sent to repair the equipment that caused his injury. Appellant also contends that the application of the warranty of seaworthiness depends on concepts of "reasonableness" and argues that it is not reasonable to apply the warranty to equipment which is "expressly represented" as unfit for service.

There are several fallacies in appellant's contentions.

Firstly, appellant assumes that a machine which is not running coupled with an order to get it going, is an "express representation" of unseaworthiness. This assumption rests on the mistaken notion that every machine or appliance that is not running is unseaworthy. At the time appellee was ordered by his superior officer to see what was wrong with the compressor and to get it going, neither the superior officer nor appellee knew of the dangerous condition which existed inside the switchbox. It was undetermined at that time whether someone had merely turned off the power to the unit or whether some minor mechanical adjustment was necessary to start up the compressor. Neither of these eventualities would amount to an unseaworthy condition unless it

were dangerous in some way. Questions of unseaworthiness are normally questions of fact[3] and the test of unseaworthiness is "whether under all the circumstances, the vessel was reasonably fit for libelant to carry out his job with reasonable safety." *Olsen v. Isbrandtsen Company, Inc.,* 209 F.Supp. 6, 8, 1963 AMC 927 (S.D., N.Y. 1962).

See:

Mitchell v. Trawler Racer, Inc. (1960), 362 U.S. 539, 80 S. Ct. 926, 9 L. Ed. 941;

Michalic v. Cleveland Tankers, Inc. (1960), 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20.

Secondly, appellee was not engaged in actually repairing the switchbox at the time he was hurt. No repair had actually been commenced.

Thirdly, the duty to furnish a seaworthy vessel to seamen in the service of a live ship (in navigation) does not depend upon concepts of "reasonableness". Reasonableness is not the standard applied in determining whether a shipowner owes a duty to his *seamen* to furnish a seaworthy ship. The duty to furnish a seaworthy ship is absolute.

See:

Gutierrez v. Waterman SS. Corp. (1962), 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297;

Mitchell v. Trawler Racer, Inc. (1960), 362 U.S. 539, 80 S. Ct. 926, 9 L. Ed. 2d 941;

Seas Shipping Co. v. Sieracki (1946), 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

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[3]*Sentilles v. Inter-Caribbean Shipping Corp.* (1959), 361 U.S. 107, 80 S.Ct. 173, 4 L. Ed. 2d 142.

The duty exists where the shipowner has no knowledge of the defective condition;

See:

Boudoin v. Lykes Bros. Steamship Co. (1955), 348 U.S. 336, 75 S. Ct. 382, 99 L. Ed. 354;

Keen v. Overseas Tankship Corp. (2nd Cir. 1952), 194 F. 2d 515, cert. den'd 343 U.S. 966, 96 L. Ed. 1362, 72 S. Ct. 1061.

and where the unsafe condition is created by another.

See:

Grillea v. U. S. (2nd Cir. 1956), 232 F. 2d 919;

Lawlor v. Socony-Vacuum Oil Co., Inc., (2nd Cir. 1960), 275 F. 2d 599, cert. den'd (1960), 363 U.S. 844, 4 L. Ed. 2d 1728, 80 S. Ct. 1614.

The duty to provide a seaworthy vessel and seaworthy equipment is not satisfied by the exercise of the utmost care or diligence by the shipowner.

See:

Mahnich v. Southern SS. Co. (1944), 321 U.S. 96, 88 L. Ed. 561, 64 S. Ct. 455, 1944 AMC 1.

In *Grillea v. U. S., supra* at p. 923, Judge Learned Hand commented on this subject as follows:

> ". . . to the prescribed extent the owner is an insurer, though he may have no means of learnin of, or correcting, the defect."

Appellee's injuries here were clearly occasioned by the shipowner's dereliction of duty to provide and maintain seaworthy equipment. By definition, the unsafe contents of the defective switchbox rendered the vessel unseaworthy as the trial Court so found.

II. ASSUMPTION OF THE RISK IS NOT A DEFENSE TO CASES BROUGHT UNDER THE JONES ACT OR THE GENERAL MARITIME LAW.

It has long been established that assumption of risk is not a defense to maritime torts.

See:

Socony-Vacuum Oil Co. v. Smith (1939), 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265;

Palermo v. Luckenbach S.S. Co. (1957), 355 U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3;

Bryant v. Partenreederei-Ernest Russ (4th Cir. 1964), 330 F. 2d 185, 189, 1965 AMC 1207.

Upon analysis of appellant's argument that the shipowner is exonerated from liability for injury caused by defective equipment when the seaman is engaged in repairing the instrumentality of injury, it suddenly becomes apparent that this proposed theory is merely an attempt to revive the discredited doctrine of assumption of risk under a different label. Under appellant's theory, a member of the crew doing a ship's repair would not be covered by the warranty of seaworthiness even as to latent dangerous conditions encountered during the repair. According to appellant, it would make no difference how unsafe the equipment was; the employee must bear the burden of injury. In addition under appellant's theory, at the point where the shipowner instructed the seaman to inspect or repair the ship's equipment, the assertion is that the employer's duty ends. If such were true, the shipowner could thereby not only shift the risk of injury to its seamen, but could also absolve itself from its absolute duty of seaworthiness owed to all crew mem-

bers. Appellant's argument in this regard is clearly contrary to the maritime law.

The case of *Dixon v. United States* (S.D., N.Y. 1954), 120 F. Supp. 747,[4] is particularly pertinent here. In the *Dixon* case the facts were analogous to those presented here. There, a crew member on a live ship was ordered by his Captain to check a ladder which had been repaired a few hours before. While the seaman was checking the ladder, one of the rungs broke and caused him to fall. After the accident, it was discovered that shoreside repairmen, in replacing the defective rungs, had cut the new rungs too long and by forcing them in, had spread or sprung the two uprights to such an extent that the weld on some of the upper rungs was loosened, creating a latent defective condition. As in our case, the seaman (Dixon) was neither warned of the dangerous condition nor did he know or have any reason to believe that these upper rungs which gave way were latently defective. The shipowner in the *Dixon* case sought exoneration from liability for the unseaworthy condition of the ladder on the ground that it did not *at the time of the accident* furnish the defective ladder to libelant for his use. The shipowner maintained that since the libelant had been ordered by the Captain to inspect the very ladder which proved to be defective in order to see if the repairs had been made by the shoreside workers, said ladder "had been withdrawn

[4]Remanded on appeal for further findings on negligence issue only, otherwise approved. *Dixon v. United States* (2nd Cir. 1955), 219 F. 2d 10, 18.

from use" until it could be determined by libelant that it was in fact seaworthy. This essentially is the same argument made by the appellant shipowner in the instant case.

In answer to this contention, the Court in *Dixon* held:

> "However its various contentions are phrased, the respondent in substance seeks to defeat recovery by Dixon upon the defense of assumption of risk . . ." (120 F. Supp. p. 748.)
>
> "The respondent seeks to carve out an exception to the doctrine of seaworthiness so as to make it inapplicable to a seaman who is ordered to inspect equipment to ascertain whether repairs have been made. Respondent assimilates Dixon's status to that of a repairman or shoreside mechanic specially engaged to restore an admittedly defective appliance to a seaworthy condition. Neither the facts nor the law supports its position. I hold on this record that libelant was neither warned of a dangerous condition nor did he know or have reason to believe that those upper rungs which gave way were grossly defective; but even if he had known, he did not in the performance of his duty, assume the risk of unseaworthy appliances." (120 F. Supp. 749.)

In the *Dixon* case, it is pertinent to note that the shipowner there also relied on *Bruszewski v. Isthmian SS. Co.* (3rd Cir. 1947), 163 F. 2d 720, and *Byars v. Moore-McCormack Lines, Inc.* (2nd Cir. 1946), 155 F. 2d 587 (cited by appellant here). The Court in *Dixon* had no difficulty in distinguishing these cases on the ground that they involved *shoreside workers* engaged

to repair the very condition which caused their injuries and upon the further ground that the defective conditions involved in the *Bruszewski* and *Byars* cases, supra, were obvious and notorious. These distinctions are equally applicable to the instant case and also distinguish *West v. United States,* 361 U.S. 118, 1960 AMC 1959, and *Pinion v. Mississippi Shipping Co.* (E.D. La. 1957), 156 F. Supp. 652, 1957 AMC 2308, which were cited in Appellant's Opening Brief.[5]

In *Rodriguez v. Coastal Ship Corp.* (S.D., N.Y. 1962), 210 F. Supp. 38, a longshoreman was injured in the course of loading operations when he slipped in a pool of oil on a live ship. The oil came from the motor of a gantry crane mounted on the deck of the vessel. The ship was an experimental vessel, the first of its kind. On behalf of the shipowner, it was argued that the ship's crane, an innovation of seacoast transportation, was *sui generis* and still in the experimental stage; that an inevitable consequence of its function was spillage of oil; and that since seaworthiness is a relative concept, the vessel was reasonably fit under the circumstances.

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[5]Historically, the right to recover under the General Maritime Law or the Jones Act required that the libelant be a "seaman" (or one who does work traditionally done by the sailors of old) and that the act complained of occur while the ship is upon navigable waters. Thus appellant's reliance upon *McDaniel v. The Lisholt,* 257 F.2d 538, and *Raidy v. U. S.,* 153 F. Supp. 777, is as misplaced as its reliance upon *West v. U. S.* and *Byars v. Moore-McCormack Lines, Inc.,* since the courts have historically held that the warranty of seaworthiness does not apply once the factual determination has been made that either the libelant is not a seaman or that the injury occurred while the ship was not in navigation.

In rejecting this contention in the *Rodriguez* case the Court stated:

> ". . . The plea, in effect, amounts to a negation of the "humanitarian policy" underlying the seaworthiness doctrine, and if accepted would revive the now discarded concept of assumption of risk. This Court is unaware of any current authority or doctrine in general maritime law which shifts to the worker the burden of the hazards created by the shipowner's endeavors, experimental or otherwise, to increase the productive earning power of his vessel, thereby relieving the shipowner of his absolute duty to supply and maintain a seaworthy vessel and appurtenances. Indeed, to the contrary, the policy has been to assess the costs of the hazards of marine service, "insofar as it is measurable in money," upon the shipowner and not the worker since he "* * * is in a position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost." (Citations omitted.) The cost of experimental activities and improvement programs to the extent they create dangerous working conditions, must be borne by the shipowner and not the seaman." (*Rodriguez v. Coastal Ship Corp.,* supra, pp. 42, 43.)

The sound principles expounded in *Rodriguez,* supra, are precisely applicable here. Just as the cost of experimental activities, to the extent that they create dangerous working conditions, must be borne by the shipowner and not the seaman, so also the shipowner, rather than the seaman, should bear the burden for injuries caused by latent dangerous conditions

encountered by the seaman in the course of inspection or repair.

See:

Huff v. Matson Navigation Co. (9th Cir. 1964), 338 F. 2d 205.

In *Sprague v. Texas Co.* (2nd Cir. 1957), 250 F. 2d 123, a member of the crew of the SS. WYOMING was injured as a result of an unexpected eruption of steam from a water heater he was working on. At the time of injury, the pressure gauge indicated the absence of any water pressure in the heater. Since the valves of the heater were open and no water was flowing, it was assumed that no water under pressure remained in the heater. The Court of Appeals in the *Sprague* case concluded that it was inescapable that the valves or the gauges were not in proper working condition, and held that the trial court did not err in directing a verdict for the seaman on the issue of unseaworthiness.

See also:

Van Carpals v. The S.S. American Harvester (2nd Cir. 1961) 297 F. 2d 9; cert. den'd in *U.S. Lines v. Van Carpals* (1962), 369 U.S. 865, 82 S. Ct. 1029, 8 L. Ed. 2d 84.

The foregoing authorities make it clear the Court below properly applied maritime law concluding that appellant's vessel, the S.S. TRANSORLEANS, was unseaworthy in this case and that the protection of the doctrine of seaworthiness applied to the appellee.

III. THE TRIAL JUDGE'S DETERMINATION THAT APPELLEE'S INJURIES WERE PROXIMATELY CAUSED BY APPELLANT'S NEGLIGENCE IS SUPPORTED BY THE EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

A. The Evidence Concerning the Defective Switchbox and the Circumstances Surrounding the Accident Are Sufficient to Support the Finding of Negligence.

At the outset it should be noted that since the evidence justified the trial judge's finding of unseaworthiness, a discussion of negligence is not required. Where the action for unseaworthiness is available, its notion of liability swallows up any notion of maritime negligence, no matter how leniently conceived and there is no need to discuss negligence.

See:

Redfern v. American President Lines, Ltd. (9th Cir. 1965), 345 F. 2d 629.

Clevenger v. Star Fish & Oyster Co. (5th Cir. 1963), 325 F. 2d 397, 402.

However, as appellee has already summarized, the evidence showed that the switchbox which caused the injury contained old, corroded, bare wires of an excessive length, a high degree of moisture condensation, and uninsulated portions of the wires touching the interior of the box. Further, it was shown to the satisfaction of the trial judge that appellee followed a standard prudent procedure in checking the equipment.

These facts alone are a sufficient predicate for the court's finding that the defective condition of the box contributed to appellee's injuries. The test of causation in seamen's injury cases is "whether the proofs

justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury."

See:

Ferguson v. Moore-McCormack Lines (1957), 352 U.S. 521, 1 L. Ed. 2d 511, 77 S. Ct. 457;

Varveris v. United States Lines Co. (2d Cir. 1957), 249 F. 2d 89.

See also:

Coray v. Southern Pacific Company (1949), 335 U.S. 520, 93 L. Ed. 208, 69 S. Ct. 275;

Rogers v. Missouri Pacific Railroad Co. (1957), 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443.

The trial court here could and did reasonably find that the old, corroded wires had existed for some time so as to have been discovered on reasonable inspection by the shipowner. By so finding, the trial court determined that the accident was due to more than a mere "malfunction in ship's gear" clearly distinguishing the present case from that of *Partenweederei, MS. Belgrano v. Weigel* (9th Cir. 1962), 299 F. 2d 897, cited by appellant.[6]

Illustrative of the Court's proper use of surrounding circumstances to find negligence or dereliction of duty is the case of *Olson Towboat Co. v. Dutra* (9th Cir. 1962), 300 F. 2d 883. Here a tugboat deckhand lost a portion of the index finger on the right hand as

[6]The *Belgrano* case is also distinguished on the ground it involved non-crew members not engaged in traditional work of a seaman, hence the injury did not come under the umbrella of protection of warranty of seaworthiness.

he cast off a wire mooring line. The only evidence presented was that of the injured seaman who testified that as he let go of the line, something cut his finger. The shipowner contended that there was no showing of negligence. Circuit Judge Barnes, for this Court, affirmed the findings of negligence and unseaworthiness, observing as follows:

> "At times circumstantial evidence is stronger than direct testimony based on powers of observation. Here appellee knows "something in the loop" caused his finger to be cut. The fact that a severe cut occurred as appellee let the loop go is strong evidence that the metal loop caused the cut, in the absence of some other factual circumstance. The wire loop was required to be handled. It was so handled, and according to plaintiff below, it injured him. No other explanation of how the injury took place, or that it did not take place, is inferred or suggested. Thus the *cause* of the injury is established by circumstantial evidence sufficient, in the absence of any other explanation, to be believed by a trier of fact. . . .
>
> "Recognizing that the burden of proving both negligence and unseaworthiness rests upon libelant below, we think the uncontradicted facts and circumstances disclosed here by a careful reading of the short record before us establishes sufficient facts and circumstances surrounding the occurrence of the injury from which negligence may be inferred." (*Dutra,* supra, p. 884.)

All the facts and circumstances presented in the present case were of course considered by the trial judge. He could reasonably infer that the old, cor-

roded, bare condition of the wire inside the switchbox did not occur, or come about between 8 and 12 o'clock on the morning of the accident. These conditions, as found by the trial Court, were of long standing and should have been discovered by the shipowner in the exercise of reasonable care. For example, in *Williamson v. Roen Steamship Co.* (E. D. Wis. 1957), 149 F. Supp. 787, 788, the proofs established that the plaintiff was solely in charge of a barge upon which he was injured when he fell through her rotted deck. The court said "the evidence is undisputed that the deck that plaintiff fell through was rotten. The jury might well have considered that this is something that would not likely have occurred between the beginning of navigation in April, 1953 and June 4, 1953."[7]

In *Interocean SS. Co. v. Topolofsky* (6th Cir. 1948), 165 F. 2d 783, 1949 AMC 198, a crew member was injured aboard his ship as a result of a defective step on a stairway. The seaman testified that after the accident he saw that two bolts were missing from the step. This was the only evidence and testimony bearing on the question of negligence. The court held that:

> "Whether such defect existed, and, if it did, whether appellant knew of, or should have known of, or discovered, this dangerous defect in the step, was a question for the jury.
>
> ". . . Reasonable inferences could be drawn that appellant was negligent in not discovering such defect by the exercise of a high degree of care in making such inspections as were required for the

[7]See also: *Rodriguez v. Texas Co.* (2nd Cir. 1958), 254 F. 2d 295.

> safety of its seaman and in keeping with its duty to furnish a safe place in which to work (citing authorities)." (*Topolofsky,* supra, p. 784.)

As Mr. Justice Black observed in *Schulz v. Pennsylvania Railroad Co.* (1956), 350 U.S. 523, 76 S. Ct. 608, 610, 100 L. Ed. 668, 1956 AMC 737:

> ". . . negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre." (350 U.S. 525.)
>
> ". . . Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn." (350 U.S. 526.)

It is of course for the trier of fact to determine from all the proven circumstances whether negligence exists. The defective condition of the wiring which appellee found inside the switchbox after the accident, clearly warranted the court's finding of negligence on the shipowner's part in this cause.

B. The Doctrine of Res Ipsa Loquitur Also Supports the Finding That Negligence on the Shipowner's Part Was a Competent Producing Cause of the Accident.

As indicated, there is ample evidence contained in the record to sustain a finding of negligence on the part of the appellant, without resort to the doctrine of res ipsa loquitur.

However, the inference of negligence derived from the doctrine of res ipsa loquitur was available to appellee on the proven facts, and the Court's finding of negligence of the shipowner on this basis is an alternative ground to sustain the decree.

In this connection it should first be noted that it was undisputed that prior to the accident, appellee had no duty to check the electrical wiring inside the switchbox; that was the duty of the ship's First Engineer. (Exh. J, p. 25.) Secondly in carrying out the orders of his superior officer, the Trial Court found that appellee's own conduct was prudent and did not contribute to his injury.[8] Once the trial court determined that appellee's actions did not culpably contribute to his injury, it is proper to utilize the doctrine of res ipsa loquitur and find, by inference, that appellant's breach of duty was the most plausible explanation of the accident.

On the facts here, this case would clearly come within the holding of *Furness, Withy & Co. v. Carter* (9th Cir. 1960), 281 F. 2d 264. In the *Carter* case, a deckhand was attempting to remove a hatch cover with a three foot long steel bar when the bar slipped out of its groove hitting the seaman on the side of his head. Judge Bone for this Court held that the accident was unusual; the appellee was guilty of no conduct which contributed to the accident; that he had no control over the hatch cover and that such a state of facts "is clearly one in which the inference of res ipsa

[8]Obedience to orders of a superior aboard ship cannot constitute contributory negligence. *Darlington v. National Bulk Carriers* (2nd Cir. 1946), 157 F. 2d 817.

could permissibly have been drawn by a jury. That is, while not compelled to infer negligence, a jury would be permitted to do so." (281 F. 2d p. 266.)

In utilizing the doctrine of res ipsa loquitur to infer negligence under such circumstances, the Court in *Carter* relied upon *Jesionowski v. Boston & Maine RR.* (1947), 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416. There the action was brought under the Federal Employers Liability Act (45 U.S.C. 51 et seq.) for the death of a brakeman in a derailment at a switch operated by the deceased. Defendant's proofs indicated that the accident was caused by the decedent's own negligence in throwing the switch but the jury rejected this evidence and found the defendant negligent. The Court of Appeals for the First Circuit reversed the judgment for the plaintiff on the ground that res ipsa loquitur applies only where the defendant has exclusive control—lacking here since the deceased had immediate control over the switch. The Supreme Court reinstated the plaintiff's judgment, stating that if res ipsa were limited as it was by the First Circuit, it "would bar juries from drawing an inference of negligence on account of unusual accidents in all operations in which the injured person himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident." (*Jesionowski v. Boston & Maine R.R.* supra, p. 457.)

The Supreme Court, through Mr. Justice Douglas, also had occasion to comment on the scope of the doctrine of res ipsa loquitur in *Johnson v. United*

States (1948), 333 U.S. 46 at p. 49, 68 S. Ct. 391, 92 L. Ed. 468, as follows:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events."

As Judge Bone pointed out in the *Carter* case, supra, that *Johnson v. United States* and Gilmore & Black (1957 Ed.), Admiralty, Sections 6-36, propound a "broader res ipsa rule for admiralty cases than that which applies in situations outside of admiralty law." (*Furness, Withy & Co. v. Carter,* supra, p. 266, n.2.)

In the instant case, the unusual accident to which appellee did not contribute coupled with the shipowner's overall control of the instrumentality of injury clearly warranted an inference under the res ipsa doctrine that some dereliction of duty by the shipowner caused appellee to suffer the electrical shock from the latently defective switchbox on appellant's ship.

IV. THE APPELLEE WAS NOT CONTRIBUTORILY NEGLIGENT.

It is difficult to determine from Appellant's Opening Brief whether the shipowner is contending that Mr. Schneider was guilty of contributory negligence as a matter of law or whether appellant is urging that the sole cause of injury was a breach of some contractual duty which appellee owed to his employer, since appellant labels his argument "Contributory Negligence" but argues an entirely different theory. Consequently, we will discuss both the contributory negligence question which is suggested by the title,

and the distinct "primary duty" question which is argued by appellant.

A. The Trial Judge's Determination That Appellee's Injuries Were Not Proximately Caused by His Own Negligence Is Supported by Substantial Evidence, and Is Not Clearly Erroneous.

Contributory negligence was asserted by appellant and rejected by the Court below.

The applicable standard in deciding whether damages should be reduced by one's own fault is whether appellee acted as a reasonably prudent man under similar circumstances.

See:

Ktistakis v. United Cross Navigation Corp. (2nd Cir. 1963), 316 F. 2d 869, 1963 AMC 1211;

Aivaliotis v. SS. Atlantic Glory (E.D. Va. 1963), 214 F. Supp. 568.

The trial Court's factual determination that Mr. Schneider was not guilty of contributory negligence is conclusive on appeal unless "clearly erroneous".

See:

Redfern v. American President Lines, Ltd. (9th Cir 1965), 345 F. 2d 629.

The record contains ample evidence from which it can reasonably be inferred that appellee's actions were consistent with those to be expected of a reasonably prudent person acting under similar circumstances.

Appellee was not told what was wrong with the air compressor. (Exh. J, p. 11.) He was instructed by the

First Engineer to go down and see what was wrong with it and to get it going. There were no gauges or other indicators on the compressor unit to indicate or warn Mr. Schneider that a circuit might be broken or defective. (Exh. J, p. 18.) There is no evidence that would indicate that appellee knew or should have known of the dangerous condition which he was about to encounter. Mr. Black, appellee's expert witness, testified that the procedure Mr. Schneider followed was in conformity with usual and standard practices under the circumstances. (Tr. 284-287.) The opinion of appellant's expert merely created a conflict in the evidence which was resolved against the shipowner by the trial judge.

On disputed questions of fact or credibility of witnesses, the decision of the trial judge is controlling.

See:

Guzman v. Pichirilo (1962), 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205;

Gypsum Carrier, Inc. v. Handelsman (9th Cir. 1962), 307 F. 2d 525, 1963 AMC 175.

It was appellant's duty to provide Mr. Schneider with a safe place in which to work and any attempt to shift this duty to appellee under the guise of contributory negligence is contrary to maritime law.

See:

Michalic v. Cleveland Tankers, Inc. (1960), 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20;

Cox v. Esso Shipping Co. (5th Cir. 1957), 247 F. 2d 629.

It is apparent that the trial judge deemed Mr. Schneider's actions in the performance of his assigned duty well within the standard of a reasonably prudent seaman and appellant did not sustain its burden of proof on the issue of contributory negligence in this cause.

B. The "Primary Duty" Rule Should Be Laid to Rest; In Any Event It Is Not Applicable Here.

Appellant argues that *Walker v. Lykes Bros. Steamship Co.* (2nd Cir. 1952), 193 F. 2d 772, should govern here to bar appellee's recovery. In relying on this 1952 case from the Second Circuit, appellant has apparently overlooked the observations of Judge Waterman in *Dunbar v. Henry DuBois' Sons Co.* (2nd Cir. 1960), 275 F. 2d 304, in which he points out that since the *Walker* decision, other Courts have obviated, distinguished, blunted and in various ways debilitated the waning authority of that flawed doctrine—"The Primary Duty Rule". Thus, the very circuit that proposed the primary duty rule and gave it life in *Walker,* now criticizes it and indicates its final resting place by observing that such doctrine "is incompatible with the Congressional mandate that contributory negligence and assumption of risk shall not bar a recovery in a Jones Act case."[9] *(Dunbar v. Henry DuBois' Sons Co.,* supra, p. 306.)

The *Walker* case and the so-called "primary duty rule" which it espouses has been subject to consider-

[9]It should be noted that only Judges Clark and Waterman agree in this regard whereas Judge Hincks avoided the question by distinguishing *Dunbar* from *Walker.*

able criticism,[10] and its application has been severely limited.[11] Even in its own circuit, the case has been expressly distinguished,[12] and a growing number of Courts are refusing to follow *Walker*.[13]

Even if it is assumed arguendo that the *Walker* doctrine still breathes, appellant failed in its burden of proving that appellee, the Third Assistant Engineer, was the ship's officer charged with the primary duty to inspect, repair and maintain the electrical system in question. Appellant produced no evidence to establish that appellee was in charge of the electrical equipment involved here, nor did the shipowner establish that Mr. Schneider was primarily responsible to his employer for failing to inspect the inside of the switchbox. The mere fact that Mr. Schneider was on watch and made a routine tour of inspection of the engine room (which room included the compressor unit) a few hours before the accident, does not establish, as appellant assumes, that Mr. Schneider had a duty to inspect the wiring *inside* the switchbox. To carry appellant's reasoning in this regard to its logical conclusion, according to the shipowner, any

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[10]See: *Boat Dagney, Inc. v. Todd* (1st Cir. 1955), 224 F. 2d 208, 1955 AMC 2083, 65 Harvard Law Review 1238 (1952); 62 Yale Law Review 111 (1952).

[11]See *Mason v. Lynch Bros. Co.* (4th Cir. 1956), 228 F. 2d 709, 1956 AMC 394;
Spero v. Steamship The Argodon (E.D. Va. 1957), 150 F. Supp. 1, 1957 AMC 1056;
Chesapeake & Ohio RR. v. Newman (6th Cir. 1957), 243 F. 2d 804.

[12]*Dixon v. United States* (2nd Cir. 1955), 219 F. 2d 10.

[13]*Ktistakis v. United Cross Navigation Corp.* (2nd Cir. 1963), 316 F. 2d 869.

engineer on watch under these circumstances would be barred from recovery for injury resulting from any dangerous condition in the engine room.

On the other hand, there was the uncontradicted testimony of Mr. Schneider, placed in evidence by opposing proctors, that it was the duty of the First Engineer and not appellee's duty to inspect the wiring (Exh. J, p. 25.) This evidence alone would prevent the application of the so-called "primary duty rule" and clearly distinguishes this case from *Walker* on the facts.

In the *Petition of Moore-McCormack Lines* (S.D. N.Y. 1958), 164 F. Supp. 198, 217, 1958 AMC 1497 one issue was whether the First Mate had the duty of properly loading cargo. The Court found that the duty was that of the Master. The fact that the Master had assigned the task of supervising the loading to the First Mate did not place the "primary duty" for such loading on the Mate.

In *Spero v. Steamship The Argodon* (E.D. Va. 1957), 150 F. Supp. 1, the First Assistant Engineer upon leaving the ship's engine room told the Third Engineer to watch the Second who was a new man. The Third fell on oil of which he had prior knowledge. The Court said: "Clearly the doctrine [*Walker*] cannot be extended to a Third Engineer not primarily charged with the duty of keeping oily substances from the engine room." (*Spero v. Steamship The Argodon*, supra, p. 3.)

Perhaps the best way to dispose of the *Walker* doctrine is to frankly state that it was erroneously

conceived and it should not be permitted to perpetuate the initial mischief which it has caused in both maritime and railroad law.

Although appellant alludes to F.E.L.A. cases[14] in the Opening Brief upon which it claims the "doctrine [primary duty rule] rests abundantly", it should be noted that since 1939 the primary duty rule has been discarded in F.E.L.A. cases.

See:

> *Louisiana & Arkansas RR. Co. v. Johnson* (5th Cir. 1954), 214 F. 2d 290, 292, citing the United States Supreme Court decision in *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54, 63, 64, 63 S. Ct. 444, 446, 87 L. Ed. 610, holding:
>
> ". . . Following the enactment of the 1939 amendment [to FELA] the Supreme Court held that 'every vestige of the doctrine of assumption of risk was obliterated from the law' and that the 'primary duty rule' in . . . *Davis v. Kennedy*[15] had been 'swept into discard' ".

Since the Federal Employers Liability Act (45 U.S.C. §51) is expressly incorporated into the Jones Act[16] under which this action was commenced, it would seem that both the *Tiller* and *Johnson* cases,

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[14]See page 21 of Appellant's Opening Brief. The F.E.L.A. cases upon which appellant apparently relies were all decided prior to the 1939 Amendment of the Federal Employers Liability Act.

[15]*Davis v. Kennedy,* 266 U.S. 147, was decided in 1924, 45 S. Ct. 33, 69 L. Ed. 212.

[16]Jones Act (46 U.S.C. 688).

supra, are direct authority for discarding the primary duty rule here.

E.

CONCLUSION

For the foregoing reasons, it is submitted that the decree of the District Court should be affirmed with interest and costs to appellee.

Dated, San Francisco, California,
February 11, 1966.

Respectfully submitted,

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Proctors for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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